

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICK LAVIS PAGE JR,

Plaintiff,

v.

STATE OF WASHINGTON et al,

Defendants.

CASE NO. C12-5862 BHS-JRC

REPORT AND RECOMMENDATION

NOTED FOR:

JANUARY 18, 2013

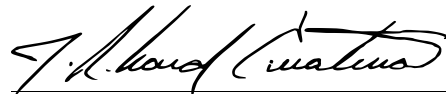
This 42 U.S.C. §1983 civil rights action has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) and Local Magistrate Judges Rules MJR 1, MJR 3, and MJR 4.

The Court recommends that Defendants' motion to dismiss the action for failure to exhaust administrative remedies be granted (ECF No. 9). Plaintiff filed an emergency grievance. The grievance coordinator told plaintiff to file a regular grievance and provide more information. Plaintiff did not pursue the matter further or appeal (ECF No. 9, Attachment C). Plaintiff has not exhausted his administrative remedies.

1 Defendants argue that plaintiff is now time-barred from filing a grievance and that he
2 cannot exhaust his administrative remedies. Defendants maintain that the action should be
3 dismissed with prejudice (ECF No. 9, page 5-6). In the Ninth Circuit, a dismissal for failure to
4 exhaust administrative remedies is an unenumerated Fed. R. Civ. P. 12(b) motion. *Wyatt v.*
5 *Terhune*, 315 F.3d 1108 (9th Cir. 2003). A careful reading of that decision reveals that the merits
6 of the case are not considered when a motion of this nature is before the Court and the proper
7 action is to dismiss the action without prejudice. *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th
8 Cir. 2003). The Court recommends that the motion be granted and that this action be dismissed
9 without prejudice.

10 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
11 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.
12 6. Failure to file objections will result in a waiver of those objections for purposes of de novo
13 review by the district judge. *See* 28 U.S.C. § 63(b)(1)(C). Accommodating the time limit
14 imposed by Fed. R. Civ. P. 72(b), the clerk is directed to set the matter for consideration on
15 January 18, 2013, as noted in the caption.

16 Dated this 21st day of December, 2012.

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19 J. Richard Creatura
20 United States Magistrate Judge
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